

(1) COLLETA MUDARIKWA (2) LUKE MWAZIYA

v

(1) THE DIRECTOR OF HOUSING AND COMMUNITY  
SERVICES N.O (2) THE CITY OF HARARE

SUPREME COURT OF ZIMBABWE  
SANDURA JA, ZIYAMBI JA & MALABA JA  
HARARE, SEPTEMBER 11, 2006 & JANUARY 23, 2007

*O Gutu*, for the appellants

*C Phiri*, for the respondents

MALABA JA: This is an appeal from a judgment of the High Court delivered on 16 March 2006, dismissing an application by the appellants for an interdict prohibiting the respondents from appointing any person other than the appellants to the posts of District Officer for Warren Park and Glen Norah respectively and for an order directing them to appoint the appellants to the posts with effect from 1 May 2003.

The appellants were employed by the second respondent, a local authority, as acting District Officers (Grade 6) for Warren Park and Glen Norah. The first appellant had been Acting District Officer for Warren Park as from 11 January 2000 whilst the second appellant was the Acting District Officer for Glen Norah as

from 1 May 2000. The first respondent was the head of the department in which the appellants were employed.

On 10 October 2001 it was decided at a Departmental Works Council meeting that employees who had been serving in acting positions be identified with a view to having them recommended for promotion to the posts in which they were acting. On 12 November the first respondent made a recommendation to the Executive Committee of the second respondent that the appellants, together with one Sam Tawanaye Sapahla who has not appealed the decision of the court *a quo*, be considered for promotion to the posts in which they were acting. The recommendation was signed by the Town Clerk and the Human Resources Director. The factor that had been taken into account in making the recommendation was disclosed *ex facie* the document as the good performance of the appellants during the time they had been acting in the posts.

The Executive Committee was due to consider the recommendations on 12 November 2001. Before it could do so, the first respondent realised that in making the recommendation he and the other officials had omitted to take into account the educational qualifications the appellants were required to have to be promoted into the posts in which they were acting. A person promoted or appointed to the post of District Officer (Grade 6) had to be in possession of a good degree in Social Sciences, Administrative Accounting or CIS. Any other post graduate qualification was considered an added advantage.

On 12 November the first respondent, with the consent of the Executive Committee, withdrew the recommendation he had made for the promotion of the appellants as there was no evidence that they possessed the requisite educational qualifications. The posts were then advertised in the local print media and a notice inviting applications for the vacancies was circulated internally. The appellants responded by submitting their applications. Some of the applicants were called for interviews on 17 April 2003. The appellants were not invited to the interview.

On 2 May 2003 the appellants made the applications to the High Court for the interdict and the order for promotion on the ground that they had the experience entitling them to promotion to the posts in which they were acting. They alleged that the insistence by the first respondent on the educational qualifications was a ploy to ensure that they were not promoted. Whilst not stating categorically that they possessed the specific educational qualifications required for the post of District Officer, the appellants said that they were nonetheless sufficiently qualified to hold the posts because they would not have been employed in the acting capacity for so long if were they not qualified for the post. They said they were entitled to be promoted into the posts in which they were acting because other employees in similar positions had been promoted. They contended that they had a legitimate expectation of being promoted arising from the manner the respondents had treated the other employees. It was their plea that should the respondents not be interdicted from appointing any other persons other than themselves and ordered to promote them to the posts in which they were acting they would suffer prejudice in the form of loss of the job as Acting District Officers.

The respondents contended that the determination of the question whether the appellants should be promoted or not did not turn solely on their competence in the performance of the duties of the office in which they were acting. Those were attributes expected of every employee. The appellants were required to show that they were possessed of the requisite educational qualifications for the post. They had failed to do so.

In dismissing the application the learned Judge said:

“It may well be true that there are those of applicants’ counterparts who were appointed to substantive grades of District Officer when they did not hold the requisite degree qualifications. The explanation by the Town Clerk is that the new requirement for these posts is that the incumbent holds a degree in Social Sciences. It follows from that that those of the applicants’ counterparts may have benefited from an old policy. That is not to say the employer is bound to apply that old requirement to the applicants ... At the time of appointment to the acting position, the applicants did not hold the requisite qualifications and therefore could not have reasonably expected to be promoted into these posts.”

The grounds of appeal were set out as being that:

1. The learned Judge in the court *a quo* misdirected himself by holding that the appellants should not have benefited from the old policy of promotion notwithstanding the fact that the majority of their counterparts, who were not holders of university degrees in social sciences had been duly promoted to the position of District Officers. The learned Judge ought to have considered that it was only fair and reasonable for the appellants to be promoted to the post of District Officers in the same way and manner in which the majority of their counterparts, in almost exactly the same circumstances as the appellants, had been promoted.
2. The learned Judge in the court *a quo* erred by holding that there was no legitimate expectation on the part of the appellants to expect to be

promoted to the position of District Officers when all the facts in the case clearly confirmed that the recommendation of both the First respondent and the Town Clerk were to be the effect that the appellants were disciplined and hardworking employees who should have been duly promoted to the position of District Officers, especially taking into account the fact that more than 80% of all District Officers within the City of Harare were not holders of University degrees in social sciences nor in any other discipline for that matter.”

The appellants failed to show that they had a right to the promotion they claimed from the respondent and sought to protect by an interdict. The order of appointment could not issue against the first respondent at all because he had no power to appoint anyone to the post of District Officer. The power to promote employees in the appellants' position lay with the Executive Committee of the second respondent.

The appellants did not have a right to be promoted. The promotion was not automatic and did not depend entirely on the duration and competence in the performance of the duties of the office in which the appellants had been acting. In the grounds of appeal the appellants accept the fact that they did not have the specific educational qualifications which the first respondent was required to consider when deciding whether or not to recommend their promotion to the Executive Committee. As a result of the inadequacy of their qualifications, the appellants were not called for interviews, and no recommendation was made for their promotion. The appellants were not placed in a situation which would have compelled the Executive Committee to consider their promotion to the substantive post. The pre-condition for the decision by the Executive Committee whether or not to exercise the power to promote them was not fulfilled.

Even if a recommendation had been made that the appellants be promoted, the Executive Committee would not have been bound by it. It would have been free to reject the recommendation. The Executive Committee was not under a binding obligation to promote the appellants in the exercise of its duty. Where, as was the case here, the promotion of an employee is not automatic but is on the basis of educational qualifications-cum-merit so that the employer is free to promote or not to promote, an order to promote cannot be made. The reason is that the promotion is discretionary.

It is elementary that no-one can be directed by an order of a court to do something which he or she is not under a binding obligation to do. An order of appointment against the second respondent in the circumstances would have directed the Executive Committee to exercise its discretion in a particular manner, namely, to promote the appellants to the post of District Officer. The court would in the circumstances be promoting the employees as its order would be the source of the binding obligation not imposed on the employer by law.

It was contended on behalf of the appellants that they had a legitimate expectation to be promoted. The expectation is said to have arisen from two events, namely, the recommendation made by the first respondent on 12 November 2001 and the promotion of other employees in similar positions as the appellants. Both arguments are based on a misconception of the requirements for the applicability of the principle of legitimate expectation. In the first place, there was nothing which the repository of the power to promote did which could constitute an assurance to the appellants that they would be promoted upon recommendation by the first respondent.

The second respondent through the Executive Committee reserved its right to reject the recommendation that the appellants be promoted.

It is clear in any case that the recommendation had been made without the question of whether or not the appellants possessed the educational qualifications required for the post having been considered. It would not have been the recommendation envisaged under the law. At the time the application for the order for appointment was made there was no recommendation that the appellants be promoted.

It must also follow that the appellants could not derive legitimate expectation to be promoted from the fact that other employees in similar positions had been promoted, if the Executive Committee acted on recommendations made on the basis of a misapprehension by the first respondent of the factors to be taken into account in making them.

In *Muwenga v PTC* 1997(2) ZLR 483(S) it was held that legitimate expectation to be appointed to a post in which the employee was acting was contingent upon the employee being qualified or arose from the contract of employment itself. It could not be founded on experience alone. GUBBAY CJ said at pp 485g-87a:

“It was not in contention, and rightly so, that the omission by the PTC to promote the appellant to the post of superintendent despite his long and good service when acting in that capacity, was one of the unfair labour practices specified in the legislation. Nonetheless the argument advanced was that the PTC had created a situation which caused the appellant to legitimately expect that he would be promoted to the post in which he was acting.

Even if it be assumed (without in any way deciding the point) that it was permissible for the labour relations officer to accept the appellant's reference, albeit falling outside those definitive acts or omissions specified as constituting unfair labour practices, the particular facts seem to me to exclude a finding that the appellant had a tangible natural law right to be promoted to the post of superintendent.

Most importantly, at the date the appellant was appointed an acting superintendent it must have been known to him that he lacked the necessary academic level in mathematics to secure the substantive post .... The appellant had the experience but not the academic qualification. How could he, therefore, legitimately or reasonably expect to obtain the appointment?

I would merely emphasise, as cautioned by CORBETT CJ [*Administrator, Transvaal & Ors v Traub & Ors* 1989 (4) SA 731(a)], that the need to avoid undue judicial interference in the administration of public authorities must always be placed in the balance. Indeed, it could be submitted with some persuasion that the promotion of an employee is a privilege, left to the discretion of the employer, to be conferred when deemed fit. It is not a right that an employee is entitled to claim unless, of course, his contract of employment so provides."

*Muwenga's case supra* is almost on all fours with the appellants' case on the facts so that its *ratio decidendi* supports the determination of the issues raised in the grounds of appeal.

The appeal is dismissed with costs.

SANDURA JA: I agree.

ZIYAMBI JA: I agree.

*Gutu & Chikowero*, appellants' legal practitioners

*Mawere & Sibanda*, respondents' legal practitioners